

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 22-0139

RHONDA LINDQUIST, OFFICE OF THE
STATE PUBLIC DEFENDER,

Petitioner,

v.

MONTANA THIRTEENTH JUDICIAL
DISTRICT COURT, HON. DONALD HARRIS,
Presiding,

Respondent.

BRIEF OF *AMICUS CURIAE* MONTANA INNOCENCE PROJECT

L. Randall Bishop
L. Randall Bishop, AAL
27 Prairie Falcon Ct.
Kalispell MT 59901
Telephone: 406-670-9394
Email: rbishop@lrblawyers.com

*Attorney for Amicus Curiae Montana
Innocence Project*

Timothy B. Strauch
Strauch Law Firm, PLLC
257 West Front Street, Ste. A
Missoula, MT 59802
T: (406) 532-2600
tstrauch@strauchlawfirm.com

*Attorney for Respondent 13th J.D. Court,
Hon. Donald Harris*

Peter F. Habein
Crowley Fleck PLLP
Suite 500
490 North 31st Street
P.O. Box 2529
Billings, MT 59103-2529
T: 406-252-3441
phabein@crowleyfleck.com

*Attorneys for Petitioner Rhonda Lindquist
and Office of State Public Defender*

Austin Knudsen, *Montana Attorney General*
David M.S. Dewhirst, *Solicitor General*
Morgan J. Varty, *Ass't Attorney General*
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
T: 406-444-2026
david.dewhirst@mt.gov
morgan.varty@mt.gov

Emily Jones
Special Ass't Attorney General
115 N. Broadway, Suite 410
Billings, MT 59101
T: 406-384-7990
emily@joneslawmt.com

Attorneys for State of Montana

Alex Rate
Akilah Lane
ACLU of Montana Foundation, Inc.
P.O. Box 1968
Missoula, MT 59806
T: (406) 443-8590
ratea@aclumontana.org
lanea@aclumontana.org

Emma Andersson (CA 260637), *pro hac vice*
American Civil Liberties Union
Foundation
125 Broad Street
New York, NY 10004
(347) 931-6337
eandersson@aclu.org

*Attorneys for Amici ACLU of Montana
Foundation and The American Civil Liberties
Union Foundation*

Marty Lambert
Gallatin County Attorney
1709 W. College
Bozeman, MT 59715

*Attorney for Amicus Curiae Montana County
Attorneys Association*

TABLE OF CONTENTS

	<u>PAGE</u>
INTRODUCTION	1
ARGUMENT.....	2
I. Indigent defendants have constitutional and statutory rights to effective assistance of counsel	2
II. Failure to provide counsel during any critical stage of a criminal proceeding violates the defendant’s constitutional right to counsel.	3
III. History of indigent defense in Montana.	5
A. Montana’s previous county-based system.	5
B. The 2002 Class Action.	5
C. State assumption of responsibility for indigent defense ...	6
IV. The Office of Public Defender’s failure to provide counsel for an average of 53 days in Yellowstone County violates defendant’s right to counsel.	7
V. The failure to provide effective assistance of counsel present in Yellowstone County is pervasive and structural. ...	9
VI. In addition to the district court’s contempt power, this Court must recognize additional legal remedies calculated to prevent these and similar pervasive and structural failures	12

A. Reconsideration of the weight attributed to the State for institutional delay where violation of the right to speedy trial is alleged is a proper consequence of the pervasive, structural failure to provide effective assistance of counsel	12
B. Recognition of prospective claims of ineffective assistance of counsel is a proper response to pervasive, structural failure to provide effective assistance of counsel.	16
CONCLUSION	18
CERTIFICATE OF COMPLIANCE	19

TABLE OF AUTHORITIES

CASES

<i>Brewer v. Williams</i> , 430 U.S. 387 (1977)	3, 4
<i>Coleman v. Alabama</i> , 399 U.S. 1 (1970)	3
<i>Gideon v. Wainwright</i> , 372 U.S. 335 (1963)	2
<i>Hamilton v. Alabama</i> , 368 U.S. 52 (1961)	4
<i>Hartinger v. State</i> , 2007 MT 141, 337 Mont. 432, 162 P.3d 95.	2
<i>Hurrell-Harring v. State</i> , 930 N.E.2d 217 (N.Y. 2010)	16, 17
<i>Kuren v. Luzerne County</i> , 146 A.3d 715 (Pa. 2016)	17
<i>Lafler v. Cooper</i> , 566 U.S. 156 (2012)	4
<i>Moore v. Illinois</i> , 434 U.S. 220 (1977)	4
<i>Powell v. State of Alabama</i> , 287 U.S. 45 (1932)	3, 4
<i>Ranta v. State</i> , 1998 MT 95, 288 Mont. 391, 958 P.2d 670	3
<i>Sellner v. State</i> , 2004 MT 205, 322 Mont. 310, 95 P.3d 708	2

<i>State v. Ariegwe</i> , 2007 MT 204, 338 Mont. 442, 167 P.3d 815	14, 15
<i>Tucker v. State of Idaho</i> , 484 P.3d 851, 865 (Idaho 2021)	17
<i>Whitlow v. State</i> , 2008 MT 140, 343 Mont. 90, 183 P.3d 861	2, 3
<i>United States v. Cronic</i> , 466 U.S. 648 (1984)	5, 17

CONSTITUTIONS & STATUTES

U.S. Const. amend. VI	3
Mont. Const. art. II, § 24	3
Sections 2-15-1029, M.C.A.	6
Section 47-1-104(3), M.C.A.	5, 6

OTHER AUTHORITIES

<i>ABA Ten Principles of a Public Defense Delivery System</i> , AM. BAR ASS'N (2002), https://perma.cc/3N4X-LMCB	10
Gould & Leo, <i>One Hundred Years Later: Wrongful Convictions After A Century of Research</i> , 100 J. Crim. L. & Criminology 825 (2010)	1
<i>Gideon's Broken Promise: America's Continuing Quest for Equal Justice</i> , https://www.in.gov/publicdefender/files/ABAGideonsBrokenPromise.pdf	9

Heidorn, *An “Obvious Truth”: How Underfunded Public Defender Systems Violate Indigent Defendants’ Right To Counsel*,
52 New Eng. L. Rev. 159 (Winter 2018) 10

Liebman, Fagan, West & Lloyd, *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 Tex. L. Rev. 1839 (2000) 1

Lucas, *Public Defense Litigation: An Overview*,
51 Ind. L. Rev. 89 (2018) 16

Primus, *Disaggregating Ineffective Assistance of Counsel Doctrine: Four Forms of Constitutional Ineffectiveness*,
72 Stan. L. Rev. 1581 (June 2020) 11

INTRODUCTION

Since 2008, it has been the mission of the Montana Innocence Project (MTIP) to promote systems of justice that are accurate, accountable, fair, and correct wrongful convictions. Through a combination of advocacy, *pro bono* legal representation and education, MTIP seeks to remedy the root causes of unjust incarcerations, improve laws and advance criminal justice in Montana.

MTIP sought leave to participate in this matter as *amicus curiae* because ineffective assistance of counsel has long been identified as a primary source of wrongful convictions. Indeed, ineffective defense lawyering has been identified as the biggest contributing factor to the wrongful conviction or death sentence of criminal defendants in capital cases. Gould & Leo, *One Hundred Years Later: Wrongful Convictions After A Century of Research*, 100 J. Crim. L. & Criminology 825, 855 (2010). Between 1973 and 1995, approximately 5,760 death sentences were imposed in the United States. Forty-one percent of those sentences that were reviewed on direct appeal were thrown out on the basis of “serious error.” Liebman, Fagan, West & Lloyd, *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 Tex. L. Rev. 1839, 1847 (2000). Egregiously incompetent defense lawyering accounted for 37% of the state post-conviction reversals. *Id* at 1850.

MTIP respectfully submits that the failure to appoint counsel is, by definition, ineffective assistance of counsel. The systemic failure of Montana’s public defender system that gives rise to this dispute calls upon this Court to affirm the district court’s well-recognized power of contempt. More fundamentally, however, it calls for recognition of fundamental, systemic remedies calculated to directly “set right” the wrongs attributable to the pervasive, structural denial of the accused’s right to counsel.

ARGUMENT

I. Indigent defendants have constitutional and statutory rights to effective assistance of counsel.

The right to counsel in criminal prosecutions is guaranteed by the Due Process Clause of the Fourteenth Amendment, the Sixth Amendment, and Article II, Section 24, of the Montana Constitution. *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Hartinger v. State*, 2007 MT 141, ¶¶ 20-21, 337 Mont. 432, 162 P.3d 95, *overruled on other grounds by Whitlow v. State*, 2008 MT 140, ¶¶ 20-21, 343 Mont. 90, 183 P.3d 861. It is universally recognized, however, that assistance of counsel satisfies constitutional and statutory mandates only if it is *effective*. When the assistance of counsel is ineffective, the fundamental fairness of the proceeding is impinged. *Sellner v. State*, 2004 MT 205, ¶ 18, 322 Mont. 310, 95 P.3d 708.

In determining the effectiveness of counsel, the court must decide whether counsel’s acts or omissions were “objectively-reasonable-under-the-

circumstances.” *Whitlow*, supra, ¶ 17 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). The question is whether the attorney’s conduct falls within the wide range of “reasonable professional assistance.” *Id.*

Regardless of the scope one assigns to the wide range of conduct that rises to the level of “reasonable professional assistance,” the total absence of counsel during any period of time between arraignment and trial cannot pass constitutional muster because the defendant has received no assistance at all.

II. Failure to provide counsel during any critical stage of a criminal proceeding violates the defendant’s constitutional right to counsel.

The right to assistance of counsel is guaranteed at every critical stage of a criminal proceeding. U.S. Const. amend. VI; Mont. Const. art. II, § 24; *Powell v. State of Alabama*, 287 U.S. 45, 57 (1932); *Ranta v. State*, 1998 MT 95, ¶ 17, 288 Mont. 391, 958 P.2d 670.

A “critical stage” is any step in a criminal proceeding where there is potential for substantial prejudice to the defendant. *Ranta* ¶ 17. *Ranta*, of course, is consistent with federal law, which has specifically identified the following as critical stages in criminal proceedings:

- Custodial interrogations both before and after commencement of prosecution, *Brewer v. Williams*, 430 U.S. 387 (1977).
- Preliminary hearings prior to commencement of prosecution where “potential substantial prejudice to defendant[s]’ rights inheres in the . . . confrontation,” *Coleman v. Alabama*, 399 U.S. 1 (1970).

- Lineups and show-ups at or after commencement of prosecution. *Moore v. Illinois*, 434 U.S. 220 (1977).
- Arraignments, *Hamilton v. Alabama*, 368 U.S. 52 (1961);
- During plea negotiations and at the entry of a guilty plea. *Lafler v. Cooper*, 566 U.S. 156 (2012).

These specific examples of critical stages of criminal proceedings are not exclusive. Indeed, the United States Supreme Court has made clear that the entire period between arraignment and the beginning of trial constitutes a critical stage of a criminal proceeding. *Brewer*, supra; *Powell*, supra.

This jurisprudence recognizes that in the absence of counsel, no one is present to request, let alone manage, time-critical investigation. Within days, crucial evidence is forever lost. Witnesses disappear. Surveillance video is recorded over. Extreme weather modifies or eradicates physical evidence. Paraphrasing the United States Supreme Court's apt observations from nearly 100 years ago, ". . . [no one can say] what a prompt and thorough-going investigation might disclose as to the facts." *Powell*, supra, 287 U.S. at 58. Defendants unable to post bail remain incarcerated. Absent counsel, no request for bail modification is presented. Ultimately, the time served may equal or exceed the probable sentence and false confession becomes the logical path to freedom.

For these and other reasons too numerous to mention, complete denial of counsel during any critical stage of a criminal proceeding is deemed so obviously prejudicial to the accused that unfairness is presumed. *United States v. Cronin*, 466 U.S. 648, 658–59 (1984). For these compelling reasons, when a court orders assignment of counsel, Montana’s Office of Public Defender is statutorily required to “*immediately* assign a public defender qualified to provide the required services.” Section 47–1–104(3), M.C.A. (emphasis added).

III. History of indigent defense in Montana.

A. Montana’s previous county-based system.

Prior to 2005, the State of Montana delegated the responsibility of providing indigent defense to each of its 56 county district courts. See MTIPApp. 1, Amended Complaint, *White et al. v. Martz et al.*, No. C DV-2002-133, Montana First Jud. Dist. Court, Lewis and Clark County (4/1/2002), ¶ 108, p. 30. The counties provided indigent defense through three methods: (1) county public defender offices, (2) counsel appointed by judges on a case-by-case basis, and (3) fixed price contracts with private attorneys. *Id* at ¶ 109.

B. The 2002 Class Action.

In 2002, a class action was filed challenging the then-existing system. It claimed all three variations of the county indigent defense programs were structured and administrated in a manner that impeded the ability of the indigent

defense counsel to provide constitutionally and statutorily adequate legal representation to their clients. The class action further alleged this insufficiency was primarily due to inadequate funding at the county level and insufficient state reimbursement of county indigent defense expenses. MTIPApp 1, ¶¶ 67-88, pp. 21-25.

Following extensive discovery and on the cusp of trial, the parties entered into a settlement agreement, approved by the district court. In part, the agreement required the State of Montana to create “a properly funded state-wide public defender system with administrative and financial resources as necessary to ensure that indigent criminal defendants receive constitutionally and statutorily adequate legal representation.” MTIPApp 2, *Stipulation and Order of Postponement of Trial*, p. 4.

In exchange, the class plaintiffs agreed to dismiss their case, but only “[i]n the event that the Montana state legislature enacts legislation that provides for a statutorily and constitutionally adequate public defender system and fully and adequately funds that system” MTIPApp 2, p. 5.

C. State assumption of responsibility for indigent defense.

Montana’s 2005 legislature took up legislation that ultimately resulted in state assumption of the responsibility to administer and fund indigent defense through a newly created public defender system, “to deliver public defender

services in all courts in this state.” Sections 2-15-1029 and 47-1-104, M.C.A., Laws 2005 ch. 449 (S.B. 146). Montana’s Office of Public Defender (OPD), has been reorganized and modified over the years since its creation, but responsibility for satisfying the constitutional right to counsel of every indigent defendant remains entirely in the hands of the State.

IV. The Office of Public Defender’s failure to provide counsel for an average of 53 days in Yellowstone County violates defendant’s right to counsel.

OPD has systematically and routinely failed to immediately assign counsel in numerous cases in Yellowstone County. Following multiple hearings, District Court Judge Donald Harris found OPD’s Director in contempt of court due to OPD’s abject failure to provide *any* legal representation to certain identified indigent defendants during critical stages of criminal proceedings.

Judge Harris’s *Order Re: Contempt and Sanctions* found OPD in contempt only with respect to those 31 listed cases in which Division Administrator, Brian Smith, admitted that “immediate assignment of a public defender had not been made” *Order Re: Contempt and Sanctions* (9/15/2021), HarrisApp011, 012, 014. One listed defendant waited 106 days for representation. The average delay was 53 days.

Explaining its rationale, the district court observed: “. . . constitutional guarantees and statutory mandates [of the right to counsel, speedy trial and

immediate assignment of public defenders] are not contingent upon the OPD's success in securing an adequate budget or upon the OPD's decision on how to allocate its existing funds." HarrisApp013.

Judge Harris correctly observed that failure to immediately assign public defenders invites delay in bond hearings, loss of critical evidence, inability to file pretrial motions, engage in plea negotiations, participate meaningfully in an omnibus hearing (typically set within 60 days of arraignment) or adequately prepare for trial (typically set within 120 days of arraignment). HarrisApp013.

It is tempting to be drawn into the debate whether evidence supported the district court's determination that OPD's obligation to "immediately assign" defense counsel required such action within three days, or ten, or some other number, but this argument misses the constitutional and statutory mark. In the 31 instances identified in Judge Harris's September 15, 2021, Order, one defendant was entirely unrepresented for more than three and a half months, not three days. On average, the admitted failure to assign counsel extended nearly two months.

The constitutional and statutory infringements that prompted the district court's exercise of the power of contempt are of a magnitude that dwarfs any presented since the state of Montana assumed responsibility for indigent defense. And as Judge Harris has made emphatically clear, the failure to appoint counsel for an average of 53 days, during which the clock is ticking on the defendant's time-

critical investigative and preparatory process, is manifestly *not* reasonable under *any* circumstances.

V. The failure to provide effective assistance of counsel present in Yellowstone County is pervasive and structural.

In 2004, the American Bar Association’s Standing Committee on Legal Aid and Indigent Defendants published *Gideon’s Broken Promise: America’s Continuing Quest for Equal Justice*, a report on the Association’s hearings on the right to counsel in criminal proceedings.¹ Fourteen years later, a co-author of the ABA Report, Dean Norman Lefstein, provided an update on the dismal “progress” made in securing the right to counsel over the intervening years. Lefstein, *Will We Ever Succeed in Fulfilling Gideon’s Promise?*, 51 Ind. L. Rev. 39 (2018).

In his follow up law review article, Dean Lefstein identified the “intensely practical reason” everyone should care about the strength of our public defense programs -- “indisputable risk of innocent persons being convicted”:

The phenomena of wrongful convictions relates directly to the quality of defense representation provided to the accused. . . . [I]f innocent defendants lack excellent lawyers with adequate support services, they stand virtually no chance of avoiding conviction. Like other wrongfully convicted defendants, defendants without adequate counsel will either plead guilty or be convicted after a trial.

Id at 51; see also Heidorn, *An “Obvious Truth”: How Underfunded Public*

¹ <https://www.in.gov/publicdefender/files/ABAGideonsBrokenPromise.pdf>

Defender Systems Violate Indigent Defendants' Right To Counsel, 52 New Eng. L. Rev. 159, 176 (Winter 2018).

The American Bar Association has outlined “Ten Principles” for evaluating public defender systems. *See* Standing Committee on Legal Aid and Indigent Defendants, *ABA Ten Principles of a Public Defense Delivery System*, AM. BAR ASS'N (2002), <https://perma.cc/3N4X-LMCB>. These principles include: a public defender agency that is independent from political influences; caseload management; sufficient time and space within which to meet clients; adequate training to ensure competent representation; and resources equivalent to that of the state's prosecutor office.

Systemic failure of public defender systems not only prevents attorneys from subjecting the state's case to adversarial testing, but also results in high turnover rates for attorneys, lack of resources, burdensome caseloads and inability to attract and hire attorneys skilled in criminal defense. Heidorn, *supra*, at 173-74.

These criticisms are well documented. Studies repeatedly reveal that indigent defense delivery systems are not only woefully underfunded but also staffed by attorneys who often lack adequate training or supervision and whose caseloads are impossible for any attorney to manage effectively. Primus, *Disaggregating Ineffective Assistance of Counsel Doctrine: Four Forms of Constitutional Ineffectiveness*, 72 Stan. L. Rev. 1581, 1613 (June 2020).

The record before this Court establishes that each of the deficiencies discussed above plagues OPD's operations in Yellowstone County. Testimony presented at the hearing before Judge Harris established that OPD cannot retain attorneys, is seriously understaffed, struggles with crushing caseloads and finds itself unable to hire new attorneys. OPDApp008.²

On December 13, 2021, all eight district court judges of the Thirteenth Judicial District signed a standing order requiring assignment of a public defender to all cases in the district within three (3) business days, "in furtherance of . . . fundamental principles of justice." See *Standing Order*, HarrisApp038-039.

This Order not only was consistent with constitutional and statutory mandates and Judge Harris's earlier determination, but also with OPD's own operational guideline. See OPDApp085.

² The purpose of that hearing, however, was not to identify the many possible reasons these problems exist. Judge Harris refused to expand the inquiry beyond which, if any, of the cases on his "list" were not properly categorized as cases in which counsel had not been timely assigned. OPDApp026-027. As convenient as it would be to isolate insufficient funding as the sole reason Montana's public defender system has failed in Yellowstone County, the record here provides no basis for any such conclusion.

Taken together, the contempt orders issued by Judge Harris and the standing order issued by all eight judges in the Thirteenth Judicial District reflect judicial recognition of the pervasive, structural ineffectiveness of Montana's public defender system in Yellowstone County, which cannot be ignored.

VI. In addition to the district court's contempt power, this Court must recognize additional legal remedies calculated to prevent these and similar pervasive and structural failures.

In the face of OPD's admitted failure to satisfy its constitutional and statutory obligations to its clients, Judge Harris employed the tools at hand to forge necessary change.

The exercise of contempt authority for a purpose such as this is neither surprising nor unwelcome and should be affirmed by this Court. This dispute, however, has drawn long overdue attention to the ramifications of pervasive, structural ineffective assistance of counsel and invites systemic remedies that actually work to correct the resulting inequities. These remedies include reconsidering the weight attributed to institutional delay for speedy trial purposes and recognition of prospective claims of ineffective assistance of counsel.

A. Reconsideration of the weight attributed to the State for institutional delay where violation of the right to speedy trial is alleged is a proper consequence of the pervasive, structural failure to provide effective assistance of counsel.

During the course of the hearing, the court and OPD counsel engaged in colloquy regarding one defendant Gulley, who stood charged with deliberate

homicide in Yellowstone County. OPDApp021-022. Judge Harris expressed concern that violation of defendant Gulley's right to counsel could well result in dismissal of all charges for failure to provide a speedy trial. OPDApp068-069.

Three months later, Judge Michael Moses confronted that precise argument during the course of an extended evidentiary hearing in *State v. Gulley*, DC-19-1604. Based upon the testimony of the former managing attorney of OPD's Region C Conflict Division, James Reinstma, Judge Moses found that defendant Gulley was without an attorney from May 27, 2021, until August 27, 2021, a total of 92 days during which,

Mr. Gulley did not have access to an attorney for any kind of interaction or advice. . . . Mr. Gulley had no one to speak with about the investigation as "there was no one . . . qualified to interact in a homicide case within the conflict division. Further, during this time no one was tasked with providing updates to Mr. Gulley as to the ongoings of his case.

MTIPApp. 3, *Findings of Fact and Conclusions of Law Re: Speedy Trial Motion*, p. 7.

Recounting the history of OPD's failures in Yellowstone County, Judge Moses took note of Judge Harris's September 13, 2021, Order holding OPD's Director in contempt and the Thirteenth District's Standing Order requiring that the OPD assign a public defender to all cases in this district within three business days, and then found,

While the Court recognizes this issue at the Billings OPD is the product of a multitude of factors, the Court is concerned for the

constitutional rights of the defendants that have been affected by the issues currently faced by the OPD.

MTIPApp 3, p. 8.

Judge Moses’s consideration of Gulley’s speedy trial motion was, of course, governed by *State v. Ariegwe*, 2007 MT 204, ¶ 34, 338 Mont. 442, 167 P.3d 815, which calls upon the court to balance four factors: (1) the length of the delay, (2) the reason for the delay, (3) assertion of the right, and (4) prejudice to the defendant.

Applying the requisite analysis, Judge Moses concluded the most significant period during which Mr. Gulley was without counsel was a consequence of the pervasive, systemic failure of Montana’s public defender system as administered by OPD:

The most significant period of delay here occurred when Mr. Gulley was without counsel from June 4, 2021, until August 27, 2021. During these 85 days, Mr. Gulley had no attorney to ask questions of and no one providing updates to him regarding his case. . . . This period of delay was neither the fault of the Yellowstone County Prosecutor’s Office nor the fault of Mr. Gulley. Rather, the OPD is responsible for Mr. Gulley having gone an entire summer without representation. Thus, this constitutes institutional delay because it was “[d]elay inherent in the criminal justice system and caused by circumstances largely beyond the control of the prosecutor and the accused.” *Ariegwe*, at ¶ 113

After first concluding that the length of the delay was significant and the presumption of prejudice as a consequence of that delay was strong, *Ariegwe* required Judge Moses to conclude, “while there has been a significant amount of

delay in this matter, *almost all of it is weighed less heavily against the State due to it being institutional delay.*” MTIPApp 3, p. 20 (emphasis added). Balancing the four *Ariegwe* factors, Judge Moses denied Gulley’s speedy trial motion:

52. In conclusion, after balancing the above factors, while more time concerning delay is attributable to the State, most of the delay is institutional due to the continued need for new counsel for Mr. Gulley and the necessary time for his counsel to work on Mr. Gulley’s defense. Institutional delay is not weighed heavily against the State.

MTIPApp. 3, p. 29 (emphasis added).

Even a casual review of Judge Moses’s decision leaves little doubt that the case turned upon the determination that institutional delay is attributable to the state, but not weighed heavily.

For normal instances of institutional delay, such as the reasonable time necessary for new counsel to become familiar with the case, *Ariegwe* properly holds should not be weighed heavily against the state. While this aspect of *Ariegwe* may have been appropriate given the manner in which Montana’s public defender system was operating fifteen years ago, circumstances now are markedly different. In Yellowstone County today there are instances of institutional delay that cannot be characterized as normal. Not only have all eight judges of the Thirteenth Judicial District recognized the pervasive, structural failure of the public defender system, but in the *Gulley* matter, Judge Moses specifically identified particularized harm – 85 days without counsel attributable solely to OPD.

The MTIP respectfully submits that the time has come to adopt a more nuanced analysis of the delays that interfere with a speedy trial. When institutional delay is not weighed heavily against the state, it becomes all but irrelevant. But where that delay is attributable to the pervasive, structural failure of the state's public defender system, as is the case in Yellowstone County, it should weigh heavily against the state for two straightforward reasons. First, the defendant is a victim of that systemic failure. Second, the defendant is utterly powerless to fix it. The state has taken responsibility for its public defender system and the state should be charged with responsibility for its failure.

B. Recognition of prospective claims of ineffective assistance of counsel is a proper response to pervasive, structural failure to provide effective assistance of counsel.

Pervasive, structural deficiencies in public defender systems has prompted actions seeking to establish *prospective* claims of ineffective assistance of counsel across the United States in recent years. Lucas, *Public Defense Litigation: An Overview*, 51 Ind. L. Rev. 89, 98-99 (2018).

An apt example of this remedy is found in *Hurrell-Harring v. State*, 930 N.E.2d 217 (N.Y. 2010). There, based on evidence that indigent defendants were regularly left without representation, the Court of Appeals of New York held that the plaintiffs had properly stated a claim for *prospective* relief from systemic violations of the right to counsel, and remanded for further proceedings.

Recognizing that traditional ineffective assistance of counsel claims are not cognizable until *after* a conviction has been rendered, the New York Court of Appeals distinguished claims where prejudice to the defendant is presumed because the State has systematically failed to provide counsel during one or more critical stages of a criminal proceeding. See *Cronic*, supra. Failures of this sort do not turn upon evidence proving that counsel's performance was inadequate or prejudicial:

To the extent that a cognizable Sixth Amendment claim is stated in this collateral civil action, it is to the effect that . . . the basic constitutional mandate for the provision of counsel to indigent defendants at all critical stages is at risk of being left unmet because of systemic conditions, not by reason of the personal failings and poor professional decisions of individual attorneys.

Hurrell-Harring, 930 N.E.2d at 226.

The holding in *Hurrell-Harring* was subsequently significantly expanded in *Kuren v. Luzerne County*, 146 A.3d 715, 751–52 (PA 2016). In *Kuren*, the Supreme Court of Pennsylvania recognized a prospective ineffectiveness claim grounded in the right to competent counsel rather than requiring that defense counsel be wholly absent.

Kuren figured prominently in *Tucker v. State of Idaho*, 484 P.3d 851, 865 (Idaho 2021), where proof of widespread, persistent structural deficiencies in the public defender system, combined with some evidence of individualized harm, was

held sufficient to support a cognizable claim of prospective systemic denial of counsel.

CONCLUSION

Judge Harris's exercise of contempt authority has focused much needed attention upon the pervasive, structural failure of Montana's public defender system in Yellowstone County. While the power of contempt is an essential and valuable tool of the district court, the Montana Innocence Project urges this Court to keep firmly in mind that the constitutional and statutory right to counsel belongs to the indigent defendant. When that right is systematically denied, for whatever combination of reasons, it is the indigent defendant that is harmed, not OPD, or even the district court.

It would be truly unfortunate if, in deciding the issues presented by OPD's Petition, this reality was lost in the mix. The purpose of this *amicus* brief is to identify remedies calculated to directly "set right," the wrong. Open consideration of the remedies outlined here are likely to prompt a quicker and more effective response to the constitutional infringement than can reasonably be expected to result from a contempt sanction alone.

DATED this 25th day of May, 2022.

MONTANA INNOCENCE PROJECT

BY: /s/ L. Randall Bishop
L. Randall Bishop

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, the undersigned certifies that the Montana Innocence Project's *Amicus Curiae* Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points, is double-spaced, and the word count calculated by Microsoft Word for Mac is 4,032, excluding Caption, Table of Authorities and this Certificate of Compliance.

DATED this 25th day of May, 2022.

MONTANA INNOCENCE PROJECT

BY: /s/ L. Randall Bishop
L. Randall Bishop

CERTIFICATE OF SERVICE

I, L. Randall Bishop, hereby certify that I have served true and accurate copies of the foregoing Brief - Amicus to the following on 05-25-2022:

Peter F. Habein (Attorney)
PO Box 2529
Billings MT 59103
Representing: Rhonda Lindquist, Office of the State Public Defender
Service Method: eService

Timothy B. Strauch (Attorney)
257 W Front Street, Ste A
Missoula MT 59802
Representing: Donald L. Harris
Service Method: eService

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Representing: State of Montana
Service Method: eService

Emily Jones (Attorney)
115 North Broadway
Suite 410
Billings MT 59101
Representing: State of Montana
Service Method: eService

Martin D. Lambert (Govt Attorney)
1709 W. College
Bozeman MT 59715
Representing: Montana County Attorneys Association
Service Method: eService

Alexander H. Rate (Attorney)
713 Loch Leven Drive
Livingston MT 59047
Representing: ACLU of Montana Foundation, Inc., American Civil Liberties Union
Service Method: eService

Akilah Maya Lane (Attorney)
2248 Deerfield Ln
Apt B
Helena MT 59601
Representing: ACLU of Montana Foundation, Inc., American Civil Liberties Union
Service Method: eService

Morgan Jacqueline Varty (Govt Attorney)
215 N Sanders St
P.O. Box 201401
Helena MT 59620-1401
Representing: State of Montana
Service Method: eService

Jordan Rhodes Kilby (Attorney)
PO Box 16960
202 West Spruce Street
Missoula MT 59808
Representing: National Association For Public Defense
Service Method: eService

Emma Anderson (Interested Observer)
American Civil Liberties Union
125 Broad Street
New York NY 10004
Service Method: Conventional

Electronically Signed By: L. Randall Bishop
Dated: 05-25-2022